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September 3, 2008

223505

## **BY HAND**

Honorable Anne K. Quinlan  
Acting Secretary  
Surface Transportation Board  
395 E Street, SW  
Washington, DC 20423-00001

ENTERED  
Office of Proceedings

SEP - 3 2008

Part of  
Public Record

Re Docket No 42105, *Dairyland Power Cooperative v Union Pacific Railroad Company*

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Dear Secretary Quinlan

Enclosed for filing is an original and ten copies of Union Pacific's Reply to Dairyland's Procedural Motions

An additional paper copy of this filing is also enclosed. Please return a date-stamped copy to our messenger.

Thank you for your attention to this matter.

Sincerely,

Michael L. Rosenthal

Enclosure

cc Counsel for Dairyland

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**



\_\_\_\_\_  
DAIRYLAND POWER COOPERATIVE,

Complainant,

v

\_\_\_\_\_  
UNION PACIFIC RAILROAD COMPANY,

Defendant  
\_\_\_\_\_

223505

Docket No 42105

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**UNION PACIFIC'S REPLY TO DAIRYLAND'S PROCEDURAL MOTIONS**

Union Pacific Railroad Company ("UP") urges the Board to deny the procedural motions filed late last Friday by Dairyland Power Cooperative ("Dairyland"). There is no need to depart from the procedural schedule established by the Board's decision served July 29, 2008, and it would be unfair for the Board to require UP to reply to Dairyland's motion to compel in the timeframe proposed by Dairyland – particularly if the Board grants Dairyland's motion to amend the procedural schedule.

As Dairyland acknowledges in its motion, this case is proceeding in accordance with the Board's scheduling order. Dairyland recommenced discovery on August 5; UP served written responses on August 19, as requested by Dairyland, and Dairyland served a motion to compel ten days later, on August 29. The Board's rules allow UP twenty days to reply to the motion to compel, and Dairyland offers no basis for departing from those rules or the existing procedural schedule. The Board certainly understood the timeframes involved in the discovery process when it issued its scheduling order.

Dairyland incorrectly suggests that its motion to amend the procedural schedule is justified because “UP has objected to all of Dairyland’s requested discovery ” (Motion at 2 ) UP raised certain objections to each of Dairyland’s requests because each was objectionable, and UP was required to object to preserve its legal rights. However, UP agreed to produce information that is responsive to the requests to the extent they were not objectionable. Now, Dairyland has moved to compel UP to produce additional information that it believes it is entitled to obtain. This is how discovery normally proceeds – there is no basis for amending the procedural schedule.

Unfortunately, Dairyland’s motion to amend the procedural schedule appears to be just the first step in a campaign to delay these proceedings. Dairyland fails to mention that it served an additional round of discovery on August 21. These new discovery requests will likely spur another round of disputes and new requests for delay. In its new requests, Dairyland is now seeking extensive information about fuel surcharges it has never paid – *i.e.*, it is now asking for “all analyses underlying UP’s development of its redesigned fuel surcharge implemented on March 21, 2007 applicable to the transportation of *non-Circular 111 coal* ” Moreover, as Dairyland reveals in its motion to compel, it is contemplating depositions of UP witnesses (Motion to Compel at 16 ). UP understands that a party may serve new discovery up until the very last day allowed for discovery in the procedural schedule, however, a party should not be allowed to use its own eleventh-hour discovery requests as a basis for extending the schedule.

Finally, the Board should not require UP to reply to Dairyland’s motion to compel on an expedited basis. Dairyland offers no basis for departing from the Board’s procedural rules. Dairyland filed a nineteen page motion, and UP will need time to respond. Moreover, Dairyland did not provide UP with a copy of either of its motions until after 5:30 on Friday, August 29 –

just before the Labor Day weekend. (See attached email from Peter Pfohl to Michael Rosenthal )

Because Dairyland served its motions at the end of the day right before a three-day weekend, Dairyland's request that UP be required to reply within ten days would actually allow UP only four full business days to reply to both motions. That is not a reasonable amount of time.

As demonstrated by this reply to Dairyland's motion to amend the procedural schedule, UP has no interest in delay. UP will reply to Dairyland's motion to compel as quickly as possible. However, there is no basis for the Board to reduce the amount of time UP is allowed under the Board's general rules of procedure and the scheduling order in this case.

Respectfully submitted,



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*Attorneys for Union Pacific Railroad Company*

September 3, 2008

**CERTIFICATE OF SERVICE**

I, Michael L Rosenthal, certify that on this 3rd day of September, 2008, I caused a copy of Union Pacific's Reply to Dairyland's Procedural Motions to be served on counsel for Dairyland by email and first class mail

  
\_\_\_\_\_  
Michael L Rosenthal

## Rosenthal, Michael

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**From:** Peter Pfohl [pap@sloverandloftus.com]  
**Sent:** Friday, August 29, 2008 5:37 PM  
**To:** Rosenthal, Michael  
**Subject:** RE: Docket No 42105, Dairyland v UP

**Attachments:** Motion to Compel Discovery PDF, Motion to Amend PDF



Motion to Compel  
Discovery PDF



Motion to  
Amend PDF (130 KB)

Mike. Please find attached the filings. A hand delivery (w/ the  
Motion to Compel attachments) has also been made at your offices. Pete.

-----Original Message-----

From: Peter Pfohl  
Sent: Friday, August 29, 2008 5:10 PM  
To: 'Rosenthal, Michael'  
Subject: RE: Docket No 42105, Dairyland v UP

Mike We're in the midst of filing (both documents) I'll send you a pdf shortly Pete

-----Original Message-----

From: Rosenthal, Michael [mailto:mrosenthal@cov.com]  
Sent: Friday, August 29, 2008 4:45 PM  
To: Peter Pfohl  
Subject: Re: Docket No 42105, Dairyland v. UP

Pete,

Yes, I'm out all week. Have you filed yet? Could you send me a pdf or word version of the filings?

Mike

----- Original Message -----

From: Peter Pfohl <pap@sloverandloftus.com>  
To: Rosenthal, Michael  
Sent: Fri Aug 29 14:16:09 2008  
Subject: Docket No 42105, Dairyland v UP

Mike Today, Dairyland is filing a motion to compel discovery. We will hand-deliver you a copy.

Also, Dairyland is planning on filing a motion to amend the procedural schedule and to set a due date for UP's response to the motion to compel. In particular, this motion will ask that the UP be required to respond to the motion to compel within 10 days, and will ask that the Sept 12, 2008 end of discovery date under the procedural schedule be eliminated (it will suggest that the Board permit the parties to propose a new end of discovery date following the Board's ruling on the motion to compel). I know that you planned on being out today, and this is somewhat late notice, but if you are in (or are checking emails), the purpose of this email is to ask whether UP consents or does not object to the motion to amend described herein.

Regards,

Pete

Peter A. Pfohl

Slover & Loftus

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